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IN THE

SUPREME COURT OF THE UNITED STATES

No. .....

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,
Petitioner,

vs.

FRANK L. PETERMAN,
Respondent.

RESISTANCE TO PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

Respondent prays that this Court refuse to grant a Writ of Certiorari to review a judgment of the United States Court of Appeals for the Eighth Circuit on Petition for Writ of Mandamus.

OPINIONS DELIVERED IN THE COURTS BELOW

The opinion of the United States Court of Appeals set out in the Appendix to Petition had several corrections to it which do not appear in the Opinion as set out in the Appendix to

Petition for Writ of Certiorari. The second and third sentences of the last paragraph on Page —A 10— should correctly read, "The *Respondent* Railroad squarely presented that question as one of law to the Trial Court. The Trial Court decided that issue of law against *the Railroad*."

STATEMENT OF THE CASE

The statement of the case by Petitioner is substantially correct except that the following more correctly states the facts.

In Answer to Special Interrogatories, the jury found the Defendant Railroad was negligent and their negligence was "*The* proximate cause of the collision and resulting injuries and damages", the Plaintiff was negligent which was "*a* proximate cause" of the collision and damages; and the Defendant Railroad had the last clear chance to avoid the collision.

On October 9, 1973, the Court overruled Defendant's Motion for Judgment, NOV, finding the evidence sufficient to submit the issue to the jury.

That the Plaintiff filed a Petition for Writ of Mandamus on January 2, 1974, twenty-eight (28) days after the Court overruled a Motion to Set Aside the Order of the Court granting a new trial.

ARGUMENT

Respondent does not feel the Petition in this case has merit but felt compelled to clarify the basis of propositions stated by the Petitioner to illustrate why certiorari should not be granted.

The question presented by this case for possible review is not that proposed by Petitioner. They neglect to show in their statement that the Court sua sponte took action only after finding the evidence sufficient to submit the issues to the jury, and many days after the ten (10) days required by Federal Rule of Civil Procedure 59. The more correct question, assuming arguendo, any question exists, would be:

> Whether the Trial Court may grant a new trial, sua sponte, eighty-two (82) days after judgment, after overruling of a Motion for Judgment NOV and finding the evidence sufficient to submit the issues to the jury.

Petitioner Railroad claims the grounds for jurisdiction and the reasons that this Court should review the matter are:

(a) The Petitioner claims that there is involved an important question of federal law arising under the Federal Rules of Civil Procedure, Rule 19 (1) (b) of the Rules of this Court does require that there be an "important" question of federal law.

However, it is surely not important to society or to this Court, or the Federal Court system, or to the legal profession to decide the narrow, technical issue presented by the ruling of the Eighth Circuit here, which is;

> "—we hold that in the absence of a Motion for New Trial made by the Defendant within 10 days under Fed. R. Civ. P 59(b), or in the absence of an Order issued by the Court within 10 days under Fed. R. Civ. P. 59(d), the trial court lacked any power to sua sponte grant a new

trial because of any alleged error in the instructions to the jury."

It is submitted that it is much more important that the Rules of Civil Procedure be interpreted toward the end that there be an "elimination of unjustifiable expense and delays" which was one of the reasons for the adoption of the Rules of Civil Procedure; 28 USCA Federal Rules of Civil Procedure XVIII.

As pointed out by the writer of the opinion in the instant case below:

> ". . . neither litigant requested a new trial nor questioned the form and content of the instructions on Last Clear Chance during the trial."

Petitioner Railroad also claims this Court should review the Court below because;

(b) " . . . there is a split of authority in the Federal Courts on the question."

but Rule 19 (1) (b) of the Rules of this Court by its very terms, provides in part;

> ". . . where a Court of Appeals has rendered a decision in conflict with another court of appeals on the same matter . . ."

and here there is no conflict between Courts of Appeals. Rather, the opinion in the instant case by the Eighth Circuit is not only not in conflict with, but follows, the decision in *Lapiczak v. Zaist*, 451 Fed 2d 79, by the Court of Appeals for the Second Circuit.

The decision of the Court of Appeals is not contradicted by any other Circuit, and is in accord with the clear wording of Federal Rule of Civil Procedure 59, requiring a motion or action

by the Trial Court within 10 days. Here, judgment was July 19, 1973, and the Court without motion, entered an Order for a new trial on October 9, 1973, after overruling the Petitioner's Motion for Judgment NOV on the basis of finding sufficient evidence to submit the issues to the jury.

CONCLUSION

The Respondent, respectfully, prays the Court deny certiorari in this case for the reason that there is no conflict of authority nor substantial Federal question presented. Quoting, from the instant United States Circuit Court of Appeals decision, "The *Respondent*-Railroad cites no case or authority as justifying the Trial Court's exercise of discretion in granting a new trial outside the 10-day limitation (contra to FRCP 59) for such an error when the Trial Court has found the evidence itself sufficient to support the jury verdict." It is clear that this case is in accord with the Federal Rules of Civil Procedure and there is no conflict within the Circuit Courts of Appeal, under the circumstances a Writ of Certiorari should not issue.

Respectfully submitted

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